

APPEAL NO. 042490  
FILED NOVEMBER 10, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on September 2, 2004. On the sole issue, the hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. W did not become final under Section 408.123. The appellant (claimant) appeals on legal and evidentiary grounds. The respondent (carrier) urges affirmance, essentially asserting that Dr. W failed to rate the compensable injury and rated only noncompensable conditions.

DECISION

Reversed and rendered.

On \_\_\_\_\_, the claimant was performing his duties as a multi-craft finisher, when he fell and sustained an injury. On May 13, 2003, the claimant was treated with Dr. G, for right shoulder pain. Dr. G found no evidence of external trauma or internal derangement and released the claimant to work without restrictions.

Upon receipt of written notice of an alleged right shoulder injury on May 22, 2003, the carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), dated May 23, 2003. In it, the carrier listed the nature of the injury as a "sprain or strain of the right" and further provided, "Carrier will pay one or more types of benefits as required by the [workers' compensation] Act. If as, and when a benefit accrues."

On July 1, 2003, the claimant began treating with Dr. W. The initial medical report indicates complaints of pain in both shoulders and the mid-back. Upon examination, Dr. W diagnosed the claimant with bilateral, grade II, rotator cuff sprains/strains; bilateral rotator cuff syndrome; bilateral bicipital tenosynovitis; bilateral trapezius muscle spasms, and myofascial pain syndrome. The claimant underwent an MRI which revealed bicipital tendinosis, acromioclavicular joint arthrosis, and degenerative changes in the right shoulder.

On July 17, 2003, the carrier submitted a second TWCC-21, listing the nature of the injury again as a "sprain or strain of the right" and disputing "compensability of any alleged neck, cervical, upper back, left shoulder, left and right arms or any other body part as it was not produced by an accidental injury nor did it/they arise out of and in the course of employment." The claimant requested a benefit review conference (BRC), stating "carrier's adjuster has verbally indicated that the entire claim is disputed" and asserting a waiver issue because the carrier failed to initiate benefits. The carrier filed a response, stating its position that the claimant "sustained a contusion injury on

\_\_\_\_\_, to his right shoulder only” and disputing injuries to claimant’s left shoulder, left arm and upper back.

A BRC was convened on August 27, 2003. The BRC report provides, “the parties agree the claimant did sustain a compensable injury on \_\_\_\_\_, the carrier maintains the injury is limited to a right shoulder contusion.” The report further provides, “Claimant’s Position: The compensable injury is to the right and left shoulder.” The benefit review officer recommended that the “claimant has failed to show any compensable injury other than the undisputed right shoulder injury.”

A CCH was convened on the issue of extent of injury on October 17, 2003. The following issue was before the hearing officer: Does the claimant’s compensable injury of \_\_\_\_\_, extend to and include an injury to both shoulders, left arm, and upper back? The parties stipulated, “It is undisputed Claimant sustained a compensable right shoulder contusion injury in the course and scope of employment with Employer on \_\_\_\_\_.” The hearing officer, then, turned his focus on the remaining body parts and determined that the compensable injury did not include the left shoulder, left arm, and upper back. The claimant appealed the adverse determination. In its response to the appeal in that case, the carrier states, “The [contested case hearing officer] and the parties had a long discussion of the stipulations as to injury to the right shoulder. Stipulation of a right shoulder contusion does not relieve the Claimant from his burden of proving any other injury to the right shoulder, any extension of injury, or any injury to any other part of the body.” The carrier argued that the claimant “did not sustain any injury (beyond what Carrier had stipulated to of a right shoulder contusion) to the left shoulder, left arm, and upper back.” The Appeals Panel affirmed the hearing officer’s decision, and the claimant appealed to district court.

On January 15, 2004, Dr. W certified that the claimant reached MMI, on that date, with a 17% IR. In his report, Dr. W notes that the claimant was found to have sustained a compensable injury to his right shoulder but the compensable injury did not include the left shoulder or upper back injury. The IR was comprised of ratings for a grade II, right rotator cuff sprain/strain, right rotator cuff syndrome, right bicipital tenosynovitis, right trapezius muscle spasm, and myofascial pain syndrome.

The carrier admits that it received Dr. W’s certification by facsimile transmission on January 22, 2004. It is undisputed that the carrier failed to dispute the first certification of MMI/IR within 90 days after its receipt of the report.

The claimant asserts that Dr. W’s MMI/IR certification became final under Section 408.123 and Tex. W.C. Comm’n, 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12). While the carrier concedes that it would be required to dispute a first certification of MMI/IR which rates extent of injury, it is the carrier’s position that Dr. W’s first certification did not become final; that the parties stipulated that the compensable right shoulder injury was limited to a contusion; that such stipulation became final when it was not appealed by the claimant; that Dr. W did not rate the compensable right shoulder contusion injury but rated only noncompensable conditions; and that it is not

required to dispute an IR which rates only noncompensable conditions. The hearing officer essentially agreed with the carrier's position and determined that the first MMI/IR certification did not become final.

The hearing officer erred in determining that Dr. W's first MMI/IR certification did not become final. The carrier's argument is premised upon the assumption that the extent of the compensable right shoulder injury was fully resolved by the parties' stipulation that the claimant sustained a compensable right shoulder contusion injury on \_\_\_\_\_. The carrier's position is untenable. When viewed as a whole, the record shows that the aforementioned stipulation was intended to establish, at a minimum, that the claimant sustained some compensable injury on \_\_\_\_\_, in order that the parties may proceed on the issue of extent of injury. The carrier's assertions to the contrary are belied by its statement that "[s]tipulation of a right shoulder contusion does not relieve the Claimant from his burden of proving any other injury to the right shoulder, any extension of injury, or any injury to any other part of the body." Indeed, the notion that the parties' stipulation was intended to fully resolve the extent of the compensable right shoulder injury cannot stand, given the absence of any language so limiting the compensable injury contained in the stipulation. Moreover, we note that the carrier appears to have accepted an additional right shoulder injury in the form of a "sprain or strain," in its initial TWCC-21.

The carrier's assertion that it is not required to dispute Dr. W's first MMI/IR certification is likewise unfounded. Section 408.123(d) provides that the first valid certification of MMI and IR becomes final if not disputed within 90 days after written notification is provided by verifiable means. Rule 130.12(b) similarly provides that a first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means, "including IRs related to [extent-of-injury] disputes." As stated above, it appears that the carrier accepted a "sprain or strain" of the right shoulder in its initial TWCC-21. Dr. W rated such a condition in his first certification of MMI/IR. We view the remainder of Dr. W's report as rating extent of injury. Pursuant to Section 408.123(d) and Rule 130.12(b), the carrier was required to dispute Dr. W's certification within 90 days. The carrier failed to do this. Accordingly, we reverse the hearing officer's decision and render a new decision that Dr. W's first certification of MMI and IR became final.

For the reasons stated above, the decision and order of the hearing officer is reversed and a new decision is rendered.

The true corporate name of the insurance carrier is **ACE AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**ROBIN MOUNTAIN  
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 200  
IRVING, TEXAS 75063.**

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Edward Vilano  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Robert W. Potts  
Appeals Judge